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The Honorable Timothy A. Bradshaw
KING COUNTY
Note for Hearing: November 16, 2018
SUPERIOR COURT CLERK
With Oral Argument
FILED

CASE NUMBER: 18-2-14942-8 SEA

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JAMES EGAN, individually,

Plaintiff,

v.

CITY OF SEATTLE, a Washington municipal
corporation

Defendant.

NO. 18-2-14942-8 SEA
(Consolidated)

**DEFENDANT CITY OF SEATTLE'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

ARTHUR WEST,

Plaintiff,

v.

SEATTLE CITY COUNCIL, CITY OF
SEATTLE, LISA HERBOLD, BRUCE
HARRELL, KSHAMA SAWANT, ROB
JOHNSON, DEBORA JUAREZ, MIKE
O'BRIEN, SALLY BAGSHAW, TERESA
MOSQUEDA, LORENA GONZALEZ,

Defendants.

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

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I. INTRODUCTION AND RELIEF REQUESTED

In this consolidated action, the Plaintiffs advance a far-reaching view of the Open Public Meetings Act (“OPMA”), arguing that communications between various Seattle City Council Members about the possible repeal of the Employee Hours Tax (“EHT”) ordinance over the weekend of June 9 – 10, 2018 were in violation of the OPMA. The law and the facts ultimately will demonstrate that no violation occurred. Full investigation and discovery will reveal nothing other than normal and appropriate day-to-day politics and governing. And this Court or others in this state ultimately will rule that there is no OPMA violation and there is nothing wrong with ordinary give-and-take between public agency members. Indeed, this is the essence of engagement and collegiality necessary to the effective functioning of democratic government.

For now, however, this motion seeks only to establish that, while the OPMA requires open government, it does not mandate gridlock. Thus, even if one assumes *arguendo* an OPMA violation prior to a public process, the fact of a duly-noticed public hearing effects a cure and the public action is valid. Under the applicable law—and regardless of what did or did not happen in the days leading up to the legislative repeal of the EHT—the raucous public Special Meeting on June 12, 2018 met all OPMA requirements. As a result, nullification of the legislative repeal of the EHT ordinance is not an available remedy here and the repeal stands.

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II. STATEMENT OF FACTS

The June 12, 2018 Special Meeting at which the Seattle City Council voted to repeal the Employee Hours Tax (“EHT”), Ordinance No. 125578, could not have been more public

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All members of the City Council were present at the Special Meeting. (Declaration of Gabriella Sanders ¶ 4(a).) The Special Meeting lasted for more than two hours. (*Id.* ¶ 4(b).) The Council received public comments for more than an hour and ten minutes. (*Id.* ¶¶ 4(c) – (d).) Approximately 46 individuals addressed the Council during the Special Meeting. (*Id.* ¶

1 4(d); *see also* Ex. 2 thereto.) Members of the public addressing the Council included both
2 those in favor of repeal of the EHT and those who opposed it; the majority of the citizens who
3 spoke opposed repeal. (*Id.*) The members of the public represented multiple points of view
4 and included affordable housing advocates, advocates for the homeless, progressive political
5 parties, community action volunteers, and business owners. (*Id.*)

6 Following the public comments, five different members of the Council engaged in the
7 debate, speaking for a total of more than 45 minutes, including two council members who
8 spoke against repeal and three who spoke in favor of repeal. (Sanders Decl. ¶ 4(e).) The final
9 vote on repeal of the EHT ordinance was done in open session before the public.¹ (*Id.* ¶ 4(f).)

10 Notice of the Special Meeting was posted more than twenty-four (24) hours in advance
11 on the City Council’s website and at the entrance of City Council Chambers at Seattle City
12 Hall. (Declaration of Monica Martinez Simmons ¶¶ 7-8; Declaration of Jodee Schwinn ¶¶ 8-
13 14; Declaration of Bob Ainsbury ¶¶ 3-8 and attachment thereto.) The City Clerk for the City of
14 Seattle is not aware of any request from a local media outlet to the Seattle City Council
15 requesting notification of special meetings pursuant to the OPMA, and in June 2018 a search of
16 City Clerk files by Municipal Archives and Information Services staff did not locate any such
17 request. (Martinez Simmons Decl. ¶ 6.)

18 III. STATEMENT OF ISSUES

19 A. The legislative repeal of the EHT ordinance that occurred at the June 12, 2018
20 Special Meeting of the Seattle City Council cannot be invalidated or nullified because the
21 Special Meeting complied with OPMA and cured any previous violation of the OPMA with
22 respect to repeal of the EHT.

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 ¹ A video recording of the June 12, 2018 Special Meeting of the Seattle City Council (the “Special Meeting video
25 recording”) is posted and publicly available at the following URL:
26 <https://www.seattlechannel.org/FullCouncil?videoid=x92047&Mode2=Video>. The Special Meeting video
recording may also be accessed through the following URL:
[http://seattle.legistar.com/MeetingDetail.aspx?ID=621147&GUID=B4EF08C0-128F-4B8D-97E4-
8A9A32F08738&Options=&Search](http://seattle.legistar.com/MeetingDetail.aspx?ID=621147&GUID=B4EF08C0-128F-4B8D-97E4-8A9A32F08738&Options=&Search).

1 B. The Court may not impose civil penalties under the OPMA on council members
2 who are not named as defendants.

3 **IV. EVIDENCE RELIED UPON**

4 This motion is supported by the Declaration of Bob Ainsbury, the Declaration of
5 Gabriella Sanders, the Declaration of Jodee Schwinn, and the Declaration of Monica Martinez
6 Simmons, all submitted herewith; and the files and pleadings of record.

7 **V. AUTHORITY AND ARGUMENT**

8 **A. Summary Judgment Is Appropriate.**

9 Summary judgment is appropriate where no genuine issue of material fact exists and the
10 moving party is entitled to judgment as a matter of law. CR 56(c). “A genuine issue is one
11 upon which reasonable people may disagree; a material fact is one controlling the litigation's
12 outcome.” *Youker v. Douglas Cnty.*, 178 Wn. App. 793, 796, 327 P.3d 1243 (2014), *review*
13 *denied*, 180 Wn.2d 1011 (2014). Plaintiff must set forth specific facts showing a genuine issue
14 for trial. *Modumetal, Inc. v. Xtalic Corp.*, __ Wn. App. __, 425 P.3d. 871, 878 (2018). “Mere
15 allegations, argumentative assertions, conclusory statements, and speculation do not raise
16 issues of material fact that preclude a grant of summary judgment.” *Greenhalgh v. Dep't of*
17 *Corr.*, 160 Wn. App. 706, 714, 248 P.3d 150 (2011). If the plaintiff “fails to make a showing
18 sufficient to establish the existence of an element essential to the party’s case, and on which the
19 party will bear the burden at trial, then the trial court should grant the motion.” *Young v. Key*
20 *Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (internal quotation marks omitted).

21 The purpose of summary judgment is to avoid an unnecessary trial or hearing. *Van*
22 *Hook v. Anderson*, 64 Wn. App. 353, 361, 824 P.2d 509 (1992) (citing *Jacobsen v. State*, 89
23 Wn.2d 104, 108 (1977)). This purpose would be well served here because there can be no
24 dispute that (1) invalidation of the EHT repeal is not available as a remedy and (2) civil
25 penalties against unnamed parties cannot be had. A trial on these issues is unnecessary.
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Op.Att'y Gen. 40 (1971)). *See also Colorado Off-Highway Vehicle Coalition v. Colorado Bd. of Parks and Outdoor Recreation*, 292 P.3d 1132, 1137-38 (Colo. 2012) (applying Colorado open public meetings law; complying meeting “cures” a preceding violation of open meeting law); *Katz v. South Burlington School Dist.*, 970 A.2d 1226, 1228 (Vt. 2009) (applying Vermont open public meetings law; same holding); *Tolar v. School Bd.*, 398 So.2d 427, 429 (Fla. 1981) (applying Florida open public meetings law; same holding); *Pearson v. Bd. of Selectmen of Longmeadow*, 726 N.E.2d 980, 985 (Mass. App. Ct. 2000) (if violation of Massachusetts open public meetings law had occurred, “it would have been cured by the [subsequent] independent deliberative action taken at the meeting of the full board”).

The underlying purpose of the OPMA is in accord. The OPMA requires open decision-making by a public body, but neither the OPMA nor other such laws require the permanent condemnation of decisions made in violation of the statute. OPAL, 128 Wn.2d at 883. This is because “without an effective way of curing [an open meetings law] violation, necessary public action may become gridlocked.” *Colorado Off-Highway*, 292 P.3d at 1137-38.

2. The legislative repeal of the EHT ordinance occurred at a properly-noticed Special Meeting.

The OPMA provides that notice of a Special Meeting of a governing body must be posted on the agency’s website and prominently displayed at the main entrance of the agency’s principal location. RCW 42.30.080(2). Notice must also be provided to any local media outlet that has on file with the governing body a written request for notification of such special meeting. (*Id.*) All such notice must be provided at least twenty-four hours in advance of such meeting. (*Id.*)

The Seattle City Council satisfied the OPMA notice requirements for the June 12, 2018 Special Meeting that resulted in the repeal of the EHT ordinance. Timely notice of the Special Meeting was posted on the City Council’s website and at the entrance of City Council Chambers at Seattle City Hall. (Martinez Simmons Decl. ¶¶ 7-8; Schwinn Decl. ¶¶ 8-14;

1 Ainsbury Decl. ¶¶ 3-8 and attachment thereto.) And no local media outlet has on file a written
2 request for notice of special meetings. (Martinez Simmons Decl. ¶ 6.)

3 **3. The Special Meeting was open and public.**

4 The June 12 Special Meeting of the City Council was OPMA-compliant. It was an
5 open meeting during which numerous and divergent views were fully aired, and it resulted in a
6 public and non-unanimous vote by the City Council to repeal the EHT ordinance.

7 The full Council was present at the Special Meeting, which lasted for more than two
8 hours. (Sanders Decl. ¶ 4(a)-(b).) The Council heard and received public comments for more
9 than an hour and ten minutes. (*Id.* ¶¶ 4(c)-(d).) There were approximately 46 individuals who
10 addressed the Council. (*Id.* ¶ 4(d).) Members of the public spoke in favor of repeal of the EHT
11 and in opposition to repeal; the majority of the members of the public who spoke did so in
12 opposition to repeal. (*Id.*) The members of the public who spoke represented multiple points
13 of view and included affordable housing advocates, advocates for the homeless, progressive
14 political parties, community action volunteers, and business owners. (*Id.*) A majority of the
15 Council actively participated in the debate, speaking for a total of more than 45 minutes,
16 including two council members who spoke against repeal and three who spoke in favor of
17 repeal. (*Id.* ¶ 4(e).) The final vote on repeal of the EHT ordinance was done in open session
18 before the public. (*Id.* ¶ 4(f).)

19 * * *

20 In sum, the properly-noticed June 12, 2018 Special Meeting of the City Council
21 accommodated extensive public commentary for well over an hour from more than 46
22 individuals on both sides of the issue and from multiple viewpoints; it also received
23 commentary from a majority of the Council, speaking on both sides of repeal, prior to the vote.
24 The Special Meeting satisfied the requirements of OPMA and cured any prior violation with
25 respect to the validity of the legislative repeal. *OPAL*, 128 Wn.2d at 883-83; *Colorado Off-*

1 *Highway*, 292 P.3d at 1137-38; *Katz*, 970 A.2d at 1228; *Tolar*, 398 So.2d at 429; *Pearson*, 726
2 N.E.2d at 985.

3 **C. Council Members Who Are Not Named Parties Cannot Be Held Personally Liable.**

4 If there is a violation of the OPMA, the potentially available remedies include personal
5 liability in the form of civil penalties against individual members of a governing body. RCW
6 42.30.120(1) - (3). But, as a threshold matter (and as a foundational matter of due process), the
7 individual members must be named parties. Moreover, members of a public body cannot be
8 subject to personal liability for any OPMA violation unless they “have knowledge of the fact”
9 that a meeting is in violation of the OPMA. RCW 42.30.120(1); *see also Miller*, 138 Wn.2d at
10 320 (finding OPMA violation, but individual council members not subject to civil penalty
11 where “violation was unknowing”).

12 Here, Plaintiff Egan’s Amended Complaint is brought against the City of Seattle and
13 four named council members. *See* Sub No. 64. The Amended Complaint does not assert any
14 claim against Councilmember Herbold, Councilmember Johnson, Councilmember Juarez,
15 Councilmember Mosqueda, or Councilmember Sawant. As a result, the Court cannot impose
16 OPMA civil penalties on Egan’s asserted claims against the five council members who are not
17 named parties.⁴

18 “A court does not have personal jurisdiction over a party if the individual or entity is not
19 designated as a party and has not been made a party by service of process.” *State, Dep’t of*
20 *Social and Health Servs. v. Zamora*, 198 Wn. App. 44, 73, 392 P.3d 1124 (2017) (citing, *inter*
21 *alia*, *Martin v. Wilks*, 490 U.S. 755, 761, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989); *City of*
22 *Seattle v. Fontanilla*, 128 Wn.2d 492, 502, 909 P.2d 1294 (1996)). And where a court lacks
23 personal jurisdiction over a party, any order or judgment entered against that party is void.
24 *Zamora*, 198 Wn. App. at 73.

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26 ⁴ Plaintiff West’s Complaint names the entire City Council, but he has since dismissed his claims with respect to
27 Councilmember Sawant. *See* Sub No. 48.

1 *Zamora* held that the Superior Court did not have the power to impose conditions on the
2 non-party Department of Corrections and remanded for further proceedings consistent with the
3 decision. 198 Wn. App. at 73. Similarly, in *Fontanilla*, the Municipal Court denied a
4 defendant's motion for reimbursement of costs against the non-party State of Washington, and
5 the Superior Court affirmed. The Washington Supreme Court affirmed on grounds that the
6 Municipal Court did not have power over an entity that was not a party in the case. *See* 128
7 Wn.2d at 502-03 (citing *Martin v. Wilks*, 490 U.S. 755). Although *Fontanilla* notes an
8 exception to the general rule in the narrow circumstances in which the interests of the nonparty
9 are adequately represented by a party with the same interests, 128 Wn.2d at 502-03, that
10 exception does not apply here.

11 In this case, the named council member defendants do not and cannot adequately
12 represent the non-party council members because the personal liability of any council member
13 is dependent on his or her state of knowledge and intent regarding OPMA compliance.
14 Individual members of a governing body are subject to civil penalties only if they attend a
15 meeting that violates the OPMA with knowledge of such violation. RCW 42.30.120(1).
16 Conversely, a member of a governing body cannot be subject to civil penalties and personal
17 liability if he or she attends a meeting that violates the OPMA without knowledge of or intent
18 regarding such violation.

19 In *Miller*, for example, the trial court found—and the Washington Supreme Court
20 affirmed on direct review—that council members “believed that they were acting appropriately
21 under the law” and, thus, were not subject to a civil penalty under RCW 43.30.120, although
22 they conducted three secret ballots in a non-public executive session. 138 Wn.2d at 331. *See*
23 *also Cathcart v. Andersen*, 10 Wn. App. 429, 436-37, 517 P.2d 980 (1974) (affirming denial of
24 civil penalties where uncontroverted affidavits established attorney general advised law school
25 faculty that their meetings did not violate the OPMA and faculty relied on advice), *aff'd*, 85
26 Wn.2d 102, 530 P.2d 313 (1975).

1 DATED: October 19, 2018.

2 **Peter S. Holmes**
3 Seattle City Attorney

4 By s/Peter S. Holmes

5 Peter S. Holmes, WSBA #15787
6 Gary Smith, WSBA #29718
7 Michael K. Ryan, WSBA #32091
8 Assistant City Attorney
9 Seattle City Attorney's Office
10 701 Fifth Ave., Suite 2050
11 Seattle, WA 98104
12 Telephone: (206) 684-8200
13 Email: pete.holmes@seattle.gov
14 Email: gary.smith@seattle.gov
15 Email: michael.ryan@seattle.gov

16 **SAVITT BRUCE & WILLEY LLP**

17 By s/David N. Bruce

18 David N. Bruce, WSBA #15237
19 Stephen C. Willey, WSBA #24499
20 Michele L. Stephen, WSBA #39458
21 1425 Fourth Avenue Suite 800
22 Seattle, Washington 98101-2272
23 Telephone: 206.749.0500
24 Facsimile: 206.749.0600
25 Email: dbruce@sbwLLP.com
26 Email: swilley@sbwLLP.com
27 Email: mstephen@sbwLLP.com

Attorneys for Defendants

*I certify that this memorandum contains 3,191 words, in
compliance with the Local Civil Rules.*

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on this date, I caused a true and correct copy of the foregoing document to be served on the following in the manner(s) indicated:

Lincoln Beauregard
Julie A. Kays
Connelly Law Offices, PLLC
2301 North 30th Street
Tacoma, WA 984033
Email: lincolnb@connelly-law.com
Email: jkays@connelly-law.com

☒ Via E-Filing
☐ Via Legal Messenger
☒ Via Email
☐ Via U.S. Mail
☐ Via Fax

Attorneys for Plaintiff James Egan

Arthur West
120 State Avenue N.E., #1497
Olympia, WA 98501
Email: awestaa@gmail.com

☐ Via E-Filing
☐ Via Legal Messenger
☒ Via Email
☐ Via U.S. Mail
☐ Via Fax

Pro Se Plaintiff

DATED this 19th day of October, 2018 at Seattle, Washington.


Gabriella Sanders

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JAMES EGAN, individually,

Plaintiff,

v.

CITY OF SEATTLE, a Washington municipal
corporation,

Defendant.

NO. 18-2-14942-8 SEA
(Consolidated)

[PROPOSED]

**ORDER GRANTING DEFENDANT
CITY OF SEATTLE'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

ARTHUR WEST,

Plaintiff,

v.

SEATTLE CITY COUNCIL, CITY OF
SEATTLE, LISA HERBOLD, BRUCE
HARRELL, KSHAMA SAWANT, ROB
JOHNSON, DEBORA JUAREZ, MIKE
O'BRIEN, SALLY BAGSHAW, TERESA
MOSQUEDA, LORENA GONZALEZ,

Defendants.

1 THIS MATTER came before the Court on Defendant City of Seattle's Motion for
2 Partial Summary Judgment, and the Court having considered:

- 3 (a) The City's Motion,
4 (b) Declaration of Bob Ainsbury and exhibit thereto,
5 (c) Declaration of Gabriella Sanders and exhibits thereto,
6 (d) Declaration of Jodee Schwinn,
7 (e) Declaration of Monica Martinez Simmons and exhibit thereto,
8 (f) Plaintiff James Egan's Opposition,
9 (g) _____, and
10 (h) The City's Reply;

11 and being familiar with the files and pleadings in this matter, and having heard oral argument
12 from counsel on November 16, 2018, is fully advised.

13 **NOW, THEREFORE**, Defendant City of Seattle's Motion for Partial Summary
14 Judgment is hereby **GRANTED** as follows:

15 1. The legislative repeal of the Employee Hours Tax ordinance cannot be nullified
16 under the Open Public Meetings Act, RCW 42.30 *et seq.* ("OPMA"), and nullification is not an
17 available remedy in this lawsuit because the June 12, 2018 Special Meeting of the Seattle City
18 Council complied with the OPMA.

19 2. The Court does not have personal jurisdiction over individual Seattle City
20 Council Members who are not named parties and the Court cannot impose civil penalties or
21 otherwise impose personal liability under RCW 42.30.120 on such individuals.

22 3. The Court cannot impose civil penalties on individual Seattle City Council
23 Members with respect to the claims asserted by Plaintiff James Egan or otherwise impose
24 personal liability on such individuals under RCW 42.30.120 if they are not named defendants.

25 4. In addition to the threshold issue of personal jurisdiction, the question of
26 personal liability for civil penalties under RCW 42.30.120 requires individualized findings of
27 knowledge and intent to violate OPMA, and there are no such findings on the present record.

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on this date, I caused a true and correct copy of the foregoing document to be served on the following in the manner(s) indicated:

Lincoln Beauregard
Julie A. Kays
Connelly Law Offices, PLLC
2301 North 30th Street
Tacoma, WA 984033
Email: lincolnb@connelly-law.com
Email: jkays@connelly-law.com

☒ Via E-Filing
☐ Via Legal Messenger
☒ Via Email
☐ Via U.S. Mail
☐ Via Fax

Attorneys for Plaintiff James Egan

Arthur West
120 State Avenue N.E., #1497
Olympia, WA 98501
Email: awestaa@gmail.com

☐ Via E-Filing
☐ Via Legal Messenger
☒ Via Email
☐ Via U.S. Mail
☐ Via Fax

Pro Se Plaintiff

DATED this 19th day of October, 2018 at Seattle, Washington.


Gabriella Sanders